Mohamad bin Che Tam v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO T-05–08 OF 2005
TENGKU BAHARUDIN SHAH, ZAINUN ALI AND HELILIAH JJCA
12 FEBRUARY 2010

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction — Trafficking in 24.27g heroin — Possession of 10.86g of methamphetamine — Whether failure by prosecution to call important witness — Whether adverse inference under s 114(g) of the Evidence Act 1950 to be invoked against prosecution — Whether evidence of agent provocateur admissible — Whether to disturb finding of fact made by trial court

Evidence — Adverse inference — Failure of prosecution to call witness — Whether material witness — Whether adverse inference ought to be drawn against prosecution — Evidence Act 1950 s 114(g)

Evidence — Agent provocateur — Admissibility of evidence — Whether evidence of agent provocateur admissible — Whether agent provocateur credible and trustworthy witnesses — Dangerous Drugs Act 1952 s 40A

Acting as an agent provocateur, one Detective Corporal Che Ya ('SP6') met with the accused after being introduced by an informer. SP6 and the accused met several times. SP6 agreed to purchase two strips of 'pil kuda' (methamphetamine) and 30 bottles of 'beras pulut' (heroin enclosed in a bottle) from the accused. Arrangement was made for SP6 to take delivery of the drugs on 6 October 2002. SP6 and his police party then made arrangements to ambush their target. At about 7pm SP6 met the accused in the compound of a mosque. The accused was in a van with an unknown male who was introduced to SP6 as 'Waenuseng'. Waenuseng went to the mosque, whilst the accused and SP6 entered the van where the accused handed SP6 a yellow plastic bag containing the drugs. SP6 then gave his signal to the police party and the accused was arrested. The learned High Court judge convicted the accused of the following charges: (i) trafficking in 24.27g heroin; and (ii) possession of 10.86g of methamphetamine. The trial judge imposed the death sentence on the accused on the first charge and sentenced him to four years imprisonment from the date of arrest on the second charge. Hence this appeal.

Held, dismissing the appeal:

(1) The defence's contention that the non-calling of an allegedly 'important'

witness ie Waenuseng was prejudicial to the accused was unfounded. The non calling of Waenuseng was due to prosecution's inability to trace him and not due to suppression or withholding of evidence which might lean in the accused's favour. All reasonable attempts at locating Waenuseng even through the Interpol had failed. Thus the adverse inference provision raised by the defence under s 114(g) of the Evidence Act 1950 was not applicable and irrelevant. *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 referred and *Ghazalee Kassim & Ors v Public Prosecutor* [2008] 3 MLJ 473 referred (see paras 28–29).

(2) The evidence of SP6 was admissible within the meaning of s 40A Dangerous Drug Act 1952. There was no evidence that SP5 and SP6 had tried to fabricate their evidence in order to frame the accused. Both SP5 and SP6 were consistent in their testimony and they were both credible and trustworthy witnesses (see paras 30 & 33).

(3) A decision and finding of fact made by a court of first instance should never be disturbed unless there is found to be a miscarriage of justice. The learned trial judge had made correct findings of fact and had not misdirected himself in this case; *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 referred (see paras 34–35).

[Bahasa Malaysia summary

Bertindak sebagai ejen perangkap, seorang Detektif Korporal Che Ya ('SP6') berjumpa dengan tertuduh selepas diperkenalkan oleh pemberi maklumat. SP6 dan tertuduh telah berjumpa beberapa kali. SP6 bersetuju untuk membeli dua keping 'pil kuda' (methamphetamine) dan 30 botol 'beras pulut' ('heroin yang terdapat di dalam botol') daripada tertuduh. Pengaturan dibuat untuk SP6 menghantar dadah tersebut pada 6 Oktober 2002. SP6 dan pasukan polisnya kemudian membuat pengaturan untuk menyerang hendap sasarannya. Pada lebih kurang pukul 7 malam SP6 berjumpa tertuduh di perkarangan masjid. Tertuduh berada di dalam van dengan seorang lelaki yang tidak dikenali yang diperkenalkan kepada SP6 sebagai 'Waenuseng'. Waenuseng pergi ke masjid, sementara itu tertuduh dan SP6 memasuki van di mana tertuduh menyerahkan kepada SP6 beg plastik kuning yang mengandungi dadah. SP6 kemudiannya memberi isyarat kepada pasukan polis dan tertuduh ditangkap. Hakim Mahkamah Tinggi menyabitkan tertuduh dengan tuduhan-tuduhan berikut: (i) mengedar heroin sebanyak 24.27g; dan (ii) memiliki methamphetamine sebanyak 10.86g. Hakim perbicaraan yang bijaksana mengenakan hukuman mati ke atas tertuduh atas tuduhan pertama dan menghukum tertuduh kepada penjara empat tahun dari tarikh ditangkap atas tuduhan kedua. Maka rayuan ini.

Diputuskan, menolak rayuan:

(1) Hujahan pembelaan bahawa dengan tidak memanggil saksi 'penting'

iaitu Waenuseng adalah prejudis kepada tertuduh adalah tidak berasas. Tidak memanggil Waenuseng adalah akibat pihak pendakwaan tidak dapat mengesan dia dan bukan akibat tindakan menyekat atau menahan keterangan yang mana mungkin berpihak kepada tertuduh. Kesemua percubaan munasabah untuk mengesan Waenuseng walaupun melalui pihak Interpol telah gagal. Oleh itu peruntukan inferens bertentangan dibangkitkan oleh pembelaan di bawah s 114(g) Akta Keterangan 1950 tidak beraplikasi dan tidak relevan. *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 dirujuk dan *Ghazalee Kassim Ors v Public Prosecutor* [2008] 3 MLJ 473 dirujuk (lihat perenggan 28–29).

(2) Keterangan SP6 adalah boleh diterima dalam maksud s 40A Akta Dadah Berbahaya 1952. Tidak terdapat keterangan bahawa SP5 dan SP6 telah mencuba untuk mereka-reka keterangan mereka untuk menganiaya tertuduh. Kedua-dua SP5 dan SP6 adalah konsisten dalam keterangan mereka dan kedua-dua mereka saksi yang boleh dipercayai dan diharap (lihat perenggan 30 & 33).

(3) Keputusan dan dapatan fakta yang dibuat oleh mahkamah bicara tidak patut diusik kecuali terdapat ketidakadilan. Hakim perbicaraan yang bijaksana telah membuat penemuan fakta yang betul dan tidak tersalah arah dirinya dalam kes ini; *Public Prosecutor v Saimin & Others* [1971] 2 MLJ 16 dirujuk (lihat perenggan 34–35).]

Notes

For cases on admisibility of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 351–352.

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 190–203.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Ghazalee Kassim & Ors v PP [2008] 3 MLJ 473; [2008] 4 CLJ 431, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Nammasiyiam v PP [1987] 2 MLJ 336, SC (refd)
PP v Mansor Md Rashid [1997] 1 CLJ 33 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1 (refd)
Wan Marzuki b Abdullah v PP [2008] 4 CLJ 631, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 40A
Evidence Act 1950 s 114(g)

Appeal from: Criminal Suit No 45–03 of 2003 (High Court, Kuala Terengganu)

Sukri bin Mohamed (Wan Haron Sukri & Nordin) for the appellant.
Ahmad b Bache (Deputy Public Prosecutor, Attrorney General's Chambers) for the respondent.

Zainun Ali JCA (delivering judgment of the court):

[1] In this appeal, the High Court on 14 May 2006 had found that the prosecution had proven its case against the accused beyond reasonable doubt. The learned trial judge convicted the accused of the following charges:

(a) trafficking in 24.27g heroin as per the charge in exh B; and

(b) possession of dangerous drugs ie 10.86g of methamphetamine as per the charge in exh D.

[2] The trial judge imposed the death sentence on the accused on the first charge and sentenced him to four years imprisonment from the date of arrest on the second charge.

[3] Hence this appeal.

FACTS OF THE CASE

[4] Acting as an agent provocateur, one detective corporal 72691, Che Ya b Ismail (SP6), on 28 September 2002 at about 8.30pm met up with the accused. The meeting took place near the mosque at Kg Banggol, Kulim, Kelantan. SP6 was introduced to the accused by one informer.

[5] It was SP6's evidence that he had approached the accused and indicated to him that he wanted to buy ten 'strips' of 'pil kuda' (the code name for the drug in the second charge). SP6 testified that there were about 200 pills in one 'strip'.

[6] SP6 testified that he negotiated with the accused, who promised to obtain and deliver to him the said drugs as requested, that same evening at 10.40pm.

[7] At this meeting SP6 alleged that the accused informed him that one 'strip' of the said drug costs RM1,200 and that the method of payment was cash on delivery. SP6, then went back to Besut.

[8] As had been previously arranged, SP6 then met the accused again on the same day at 10.40pm in front of Hospital Lati, Pasir Mas. However the accused brought with him only one 'strip' of pills (not ten, as ordered by SP6) since the accused said supply of the said drug had run out. The accused in that meeting asked SP6 whether he would like to order 'beras pulut' — ie the code name for heroin (which is enclosed in a bottle).

[9] Since SP6 told the accused that he has no client requiring the said drug, he declined to make an order. SP6 then took the drug brought by the accused (ie one 'strip' only) and paid for them, which set him back at RM1,200.

[10] According to SP6, prior to the accused's arrival at this second meeting, he had arrived there earlier with the informer. SP6 testified that he saw the accused arriving there by a motor van. Though the informer did not join in the negotiation earlier between SP6 and the accused, the informer was within range and after the said negotiation between SP6 and the accused, both the informer and SP6 went back together.

[11] Subsequently on 2 October 2002, at about 3pm the accused contacted SP6 by his handphone. The accused inquired of SP6 whether he has any request for the 'beras pulut' (heroin). SP6 then placed an order for 30 bottles of the 'beras pulut' and two 'strips' of the pills.

[12] According to SP6, the accused put the price down at RM350 per bottle of 'beras pulut' and RM1,200 for a 'strip' of the pills.

[13] On 4 October 2002 at about 4.30pm the accused called SP6 and asked SP6 to go to Besut on the following day ie on 5 October 2002 to take delivery of the drugs which SP6 had ordered.

[14] SP6 then went to Besut on the appointed day (ie 5 October 2002) together with one constable Sabri, in a car, with registration No TAB 795.

[15] The trip to Besut on 5 October 2002 was planned by SP6 to entrap the accused. SP6 testified that the accused told him to keep his telephone line open so as to facilitate communications between them.

[16] SP6 then called Detective-Sergeant Salleh b Daud ('SP5') and subsequently SP6 met SP5 and three other police personal ie Lans Corporal Hardy, Lans Corporal Ghafar and Lans Corporal Suhaimi.

[17] SP6 and the police party gathered at Putra Inn, Besut for a briefing. They waited there but no call came from the accused. SP5 and his party returned to Kuala Trengganu.

[18] On 6 October 2002 at 9.30am SP6 called the accused and was told that he was in Golok and would call back before leaving the Besut with the drugs. At 4pm the accused called SP6 and asked him to wait in Kg Tok Dor as he would be coming in a red kancil. SP6 then called SP5 and they made arrangments to ambush their target.

[19] At about 7 in the evening, SP6 was informed by the accused that he was in the compound at Kg Tok Dor mosque.

[20] SP6 made his way there and saw the accused in a van with registration No PBR 202. It was the same van that he saw at Hospital Lati, Pasir Mas on 28 September 2002. In the van was the accused and an unknown male.

[21] SP6 was introduced by the accused to the unknown male who the accused told him was his friend. The accused introduced his friend as 'Waenuseng'. All three of them were then outside the van.

[22] SP6 then asked the accused about the drug and the accused asked him to enter the van. They did by going through the back door on the left. The accused then sat at the back seat (behind the driver's seat). When they entered the van, Waenuseng went to the mosque.

[23] SP6 went into the van and sat in between the driver's seat and the left passenger seat. They (SP6 and the accused) faced each other in the van and the accused then took a yellow plastic bag from beneath a folded box in the foot well behind the driver's seat.

[24] The accused gave the plastic bag to SP6 who opened it and found inside it, a blue tissue box in which was found three packages wrapped in Thai newspaper. There was also a blue plastic packet wrapped round in yellow cellophane.

[25] The accused then told SP6 that the yellow plastic bag contain the drugs ordered by him (SP6). SP6 then gave his signal to the police party, who then surrounded the van and swung into action.

[26] SP6 arrested the accused, whilst Constable Sabri and Lans Corporal Ayub detained Waenuseng.

[27] From the subsequent evidence as found in the 'rekod rayuan', we find that the learned trial judge had made proper findings of facts. There was careful scrutiny of the events and surrounding circumstances leading up to the decision which showed no indication of error or misdirection on his part.

[28] The arguments raised by the defence are refutable. The defence contention that the non-calling of an allegedly 'important' witness ie Waenuseng is prejudicial to the accused is unfounded. The non-calling of Waenuseng was due to prosecution's inability to trace him and not due to suppression or withholding of evidence which might lean in the accused's favour. As was made clear, and proven, all reasonable attempts at locating Waenuseng even through the Interpol had failed.

[29] Thus the adverse inference provision raised by the defence under s 114(g) of the Evidence Act, 1950 is not applicable and irrelevant (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1 and *Ghazalee Kassim & Ors v Public Prosecutor* [2008] 3 MLJ 473; [2008] 4 CLJ 431).

[30] In our view the trial judge had made a correct finding of fact when he said that the evidence of SP6 is admissible within the meaning of s 40A of the Dangerous Drugs Act 1952.

[31] The authorities in support of this contention include:

(a) *Munusamy v Public Prosecutor* [1987] 1 MLJ 492;

(b) *Nammasiyiam v Public Prosecutor* [1987] 2 MLJ 336;

(c) *Public Prosecutor v Mansor Md Rashid* [1997] 1 CLJ 33; and

(d) *Wan Marzuki b Abdullah v Public Prosecutor* [2008] 4 CLJ 631;

[32] The defence attached the manner in which the accused was arrested. Even if there were vigorous challenges to the evidence of SP5 and SP6, in this regard, they did not shake their credibility.

[33] There is no evidence or indication in the appeal record that SP5 and SP6 had tried to fabricate their evidence in order to frame the accused. The trial judge's finding was that both SP5 and SP6 were consistent in their testimony and that they were both credible and trustworthy witnesses.

[34] We can find nothing to indicate otherwise nor can we justify an intervention with that finding. As the court in *Public Prosecutor v Salimin & Others* [1971] 2 MLJ 16 had stated, a decision and finding of fact made by a court of first instance should never be disturbed unless there is found to be a miscarriage of justice.

[35] In the circumstances, we find that the learned trial judge had made correct findings of fact and had not misdirected himself in this case.

[36] We unanimously therefore dismiss this appeal. The conviction and sentence of the High Court is hereby affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum